No. 91-1020

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MASON H. ROSE,

Petitioner,

vs.

SUSAN T. FULTZ, ROGER E. HAWKINS, CHRISTA M. HAWKINS, AND HOME SAVINGS OF AMERICA, F.A.,

Respondents.

REPLY BRIEF

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NEW QUESTION RAISED BY RESPONSE

Respondents have unwittingly raised an additional question that is worthy of review by this Court. Their Question Presented No. 2a (Response, p. xi) asks if "the California state court's application of California law relating to collateral estoppel give[s] rise to a federal question within the purview of this Court?"

The answer to that question is easy, and was provided by this Court more than 50 years ago in Toucey v. N. Y. Life Ins. Co., 314 U.S. 118, 129 n. 1 (1941): "Pleading a federal decree as res judicata in a state suit raises a federal question reviewable in this Court . . . ."

Despite that easy answer to Respondent's question, it raises an obvious follow-up question that has not yet been answered by this Court but should be, as to whether it was proper for the California Court to apply California law to a

plea of collateral estoppel by a federal decree. Restating that follow-up question as our own Question Presented No. 3, it is this:

> 3. May a state court apply its own state law of collateral estoppel, to give preclusive effect to a prior federal judgment or decree on a matter of federal law, where the prior federal ruling would not have preclusive effect under federal law?

This Court long ago established that a state court cannot give a federal decree less preclusive effect than it would have under federal law. Stoll v. Gottlieb, 305 U.S. 165, 170-71 (1938). It should now rule on whether a state court can give a federal decree more preclusive effect than it would have under federal law.

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REPLY BRIEF

This brief is the reply of Petitioner MASON H. ROSE ("Rose") to the Response to his Petition for Certiorari, filed by Respondents ROGER E. HAWKINS, CHRISTA M. HAWKINS and HOME SAVINGS OF AMERICA, F.A. (collectively "Respondents"). The other respondent, SUSAN T. FULTZ, did not file a response.

REPLY ARGUMENT

Respondents' argument is almost entirely devoted to contentions that certiorari should not be granted for procedural reasons. They include a contention that Rose

did not adequately raise federal questions in the state courts, three contentions that there were separate and independent non-federal grounds for the rulings of the California Courts, and even a contention that Rose did not properly set forth the grounds for this Court's jurisdiction. None of those contentions has merit.

A. Due process and other federal issues were adequately raised below. Rose's jurisdictional challenge to the federal judgment, and Respondents' defense of collateral estoppel by federal rulings, raised federal questions, and Rose so stated below.

First, the Response (pp. 8-15) argues that Rose's due process issues were not adequately raised below, falsely asserting there was no discussion of applicable constitutional provisions, or any cases which interpret them. On the contrary, in the trial court alone, Rose's brief quoted Moore's Federal Practice four times (CT, pp. 326, 335, 338, 339), and cited three decisions of this Court a total of six

times (CT, pp. 325, 336-39, 343); Rose provided the court with full copies of each of those cases (CT, pp. 264-98).

Rose quoted (CT, p. 336) a statement from one of those cases [Ins. Corp. of Ireland v. Compagnie des Bauxites, 450 U.S. 697, 702 (1982)] that the requirement of personal jurisdiction "flows . . . from the Due Process Clause . . . and protects an individual liberty interest." That quotation was followed by a statement (CT, p. 336) that "It is that right to due process, under the constitutions of the United States and California, that Rose seeks to assert here." (Emphasis added.)

Thus Rose's jurisdictional challenge to the Colorado default judgment raised a federal question, under the Due Process Clause of the U.S. Constitution, and he said so, to the California trial court.

Further, Respondents' defense of collateral estoppel, based on rulings of the

federal courts, raised federal questions, and Rose so advised the California Court of Appeal in his Opening Brief (at p. 16), not first in a petition for rehearing, as follows:

> "Incidentally, if there were a difference between California and federal law on a collateral estoppel question (as there is not on this one), federal law would control, because all of the rulings asserted as collateral estoppel here were rulings of federal courts."

B. The California court's application of its own state law of collateral estoppel to a federal judgment "raises a federal question reviewable in this Court." That is a new Question Presented, worthy of review here.

As one of its contentions that there were independent state grounds for the California judgment, the Response (pp. 17-20) argues that its determination that Rose is collaterally estopped was made under state law and precludes review here.

But this Court long ago ruled that

"Pleading a federal decree as res judicata in a state suit raises a federal question reviewable in this Court . . . ." Toucey v. N. Y. Life Ins. Co., 314 U.S. 118, 129 n. 1 (1941). "The Supreme Court has consistently adhered to the proposition that it has jurisdiction to review state decisions that deal with the res judicata effects of federal judgments." 18 Wright, Miller & Cooper, Federal Practice and Procedure (1981), Jurisdiction sec. 4468, p. 651.

Since the rulings asserted as collateral estoppel here were all federal, under Toucey pleading those rulings as preclusive raised a federal question that can be reviewed here. Furthermore, it raises important questions that should be reviewed here, as to whether it was proper for the California Court of Appeal to apply its own state law of collateral estoppel to those federal rulings. Rose submits that

it was not, and he has stated this new Question Presented No. 3, immediately following the front cover of this brief:

> 3. May a state court apply its own state law of collateral estoppel, to give preclusive effect to a prior federal judgment or decree on a matter of federal law, where the prior federal ruling would not have preclusive effect under federal law?

Our petition for certiorari (pp. 35-38) showed that the California Court of Appeal applied an aberrant definition of "actually litigated" which changed the result. That definition was taken from a published California case that conflicts with the federal law established over a century ago in Cromwell v. County of Sac, 94 U.S. 351, 353 (1877). We cited and quoted Cromwell, in our Opening Brief in the California Court of Appeal (at p. 15).

Our petition for certiorari (p. 37)

further showed that California's use of that aberrant definition would prevent any jurisdictional attack on a default judgment, "because (expressed or not) any judgment necessarily decides that the court had jurisdiction to render it." See Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938) ["Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter."]

Here the rulings asserted as collateral estoppel were not only made by federal courts; they also were made under federal law, relating to jurisdiction of the federal court, and the mooting of federal appeals. It is therefore particularly appropriate that the preclusive effect of those rulings be determined under federal law.

According to 1B Moore's Federal Practice (1991), Para. 0.406[1] at p. 272

(emphasis added; footnotes omitted):

> "Under [28 U.S.C.] section 1738, it is the res judicata principles of the jurisdiction rendering the judgment that are to be applied, not the res judicata principles followed by the polity the laws of which govern the substantive issues. It follows that the preclusive effect of a state court judgment, though based on federal law, is measured by state law, and conversely, the preclusive effect of a federal judgment in a diversity case is governed by federal law.

But none of the cases cited by Moore for that emphasized proposition involves a state court's giving more preclusive effect to a federal judgment than a federal court would. That is the question here; only this Court can decide that question, and it is worthy of decision in this case.

c. California law does not and cannot prevent collateral attack on a federal judgment or order that is void for lack of jurisdiction.

As a second contention that there were independent state grounds for the California judgment, the Response (pp. 20-22) argues that the determination, that Rose's claims were an improper collateral attack on the prior federal judgment, is an independent state ground that precludes review here.

This argument fares no better than the first. A state has no more right to apply it own law to determine whether a claim is an improper collateral attack than whether that claim is collaterally estopped.

Here our jurisdictional claims are indeed collateral attacks on the Colorado default judgment, and such attacks have been expressly authorized by this Court. According to Ins. Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 697, 701 (quoted in our trial court brief at CT, p.

336, and in our Court of Appeal Opening Brief, p. 18)"

> "A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding."

Neither the California Court of Appeal opinion nor the case it cites rejects our jurisdictional claims as an improper collateral attack on the federal rulings. Our jurisdictional claims are rejected (at Rose Appendix, p. A 12) solely on grounds of collateral estoppel ["Collateral estoppel bar's Rose's action . . . ."]."

The California opinion is obviously rejecting only our nonjurisdictional claims when it states (in another section, section B (Rose Appendix, p. A 13; emphasis added): "<u>If a court has jurisdiction over the subject matter and parties</u>, the order or final judgment is not subject to col-

lateral attack in a later proceeding, regardless of whether it is contrary to statute or otherwise erroneous."

As for our nonjurisdictional claims, federal law must determine whether those claims are collateral attacks on federal court rulings, and if so whether or not they are proper. Rose contends that those claims are not improper, because they are based on a federal court order (for the sale of his home) that Rose could not appeal because the Ninth Circuit dismissed his appeal from it. That is the second of the two questions raised by his petition for certiorari. It too is worthy of decision by this Court here.

D. The fact that the trial court ruling was on demurrer, for failure to state a cause of action, does not insulate it from review by this Court.

As a third contention that there were independent state grounds for the California judgment, the Response (pp. 22-24) argues that the sustaining of the demurrer

for failure to state a cause of action was an independent state ground that precludes review here.

But that part of the trial court's judgment (Rose Appendix, p. A 19, quoted at Response, p. 23) finds that Rose "is unable to further amend his pleadings to state a valid cause of action against [Respondents]. This is because the facts provided by Plaintiff Rose clearly show that the subject property was purchased by the Hawkins and financed by Home, respectively, pursuant to a valid Court Order expressly authorizing the purchase." (Emphasis added.)

Thus the only basis for sustaining the demurrer without leave to amend was the validity of the federal court order for the sale of the home. We do not quarrel with the finding that we could not amend to assert the claims we raise here if the federal court order was valid. But, as

shown in previous sections of this reply, the validity of the federal court order, as well as the choice of law for making that determination, are federal questions; they do not and cannot provide an independent state ground that would preclude review by this Court.

Long ago, this court rejected a contention similar to Respondent's here, in Kalb v. Feuerstein, 308 U.S. 433 (1940). There (as here) a state court sustained demurrers for failure to state a cause of action, against purchasers at a sheriff's (here marshal's) sale (308 U.S. at 436-37). There (as here), the purchasers asserted "Independent and adequate non-federal grounds" supporting the state court decision (arguments of counsel, 308 U.S. at 434).

In Kalb, this Court properly rejected that contention, because federal law ousted the state court of jurisdiction in

a bankruptcy matter (308 U.S. at 437-38). Here Rose raises jurisdictional claims and other claims under federal law, relating to the validity of a federal judgment. The result should be the same as in Kalb.

E. This Court has jurisdiction to review this final judgment of "the highest court of a State in which a decision could be had," where rights are "claimed under the Constitution or statutes of the . . . United States."

As its last procedural contention, the Response (pp. 24-26) argues that the petition should be denied for failure to set forth the basis for jurisdiction. Respondents complain that we did not identify the portion [of 28 U.S.C. sec. 1257] we rely on.

It should be obvious that we were invoking this Court's jurisdiction to review final determinations of state courts on federal questions, which is authorized by the language quoted in the above heading.

The case cited in the Response (pp. 25-

26) would not justify denying the petition on a technicality, as Respondents request here. There, in Gorman v. Washington University, 316 U.S. 98, 101, there was not just a technical failure to identify the relevant portion of this section; the petitioner did not establish that the state court decision was by the "highest court . . . in which a decision could be had."

Here, by contrast, we showed that this requirement was satisfied (attaching copies of state court rulings at all levels), and it was obvious that we raised federal questions arising from the prior rulings of federal courts. There is no question of jurisdiction (of this Court) here.

F. Respondents' brief discussion of the merits is not responsive.

The response (pp. 26-29) gives short shrift to the merits. It does not respond

to our argument of the merits in the petition, but merely echoes the rulings below, which the petition has already addressed. Accordingly, we stand on our merits arguments in the petition and will not repeat them here.

CONCLUSION

Certiorari should be granted, so this Court can review the new Question Presented No. 3 (raised by the Response and discussed in this reply), as well as the two questions identified in the petition.

Respectfully submitted,

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